STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Verizon North Inc. and Verizon South Inc.	)	
	)	Docket No. 02-0560
Verified Petition for Certification Pursuant to	)	
220 ILCS 5/13-517(a) or Waiver Pursuant to	)	
220 ILCS 5/13-517(b).	)	

REPLY BRIEF OF

THE PEOPLE OF THE STATE OF ILLINOIS

PUBLIC VERSION

Information marked by *** - - *** claimed to be proprietary by Verizon

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General of the State of Illinois

JANICE A. DALE
SUSAN L. SATTER
RANDOLPH R. CLARKE
Assistant Attorneys General
Public Utilities Bureau
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
Telephone: (312) 814-3736
Fax (312) 814-3212
jdale@atg.state.il.us
ssatter@atg.state.il.us
rclarke@atg.state.il.us

Dated: April 4, 2003

TABLE OF CONTENTS

The People of the State of Illinois, by the Attorney General, LISA MADIGAN, ("the People") respond to the Initial Briefs of Verizon North, Inc. and Verizon South, Inc. (jointly "Verizon") and Staff of the Illinois Commerce Commission as follows:

I. Verizon's Brief Betrays a Refusal to Accept the Mandate of the General Assembly Expressed in Section 13-517.

A. Verizon's Stated Desire to Control Deployment of Advanced Services Without Regard to Section 13-517 Is Contrary to Law and Should Be Rejected.

In enacting section 13-517 of the Public Utilities Act, the General Assembly directed all incumbent local exchange carriers ("ILECs"), including Verizon, to deploy advanced telecommunications services to 80% of their customers by January 1, 2005. 220 ILCS 5/13-517(a). On the day of the vote on House Bill 2900, which included section 13-517, Senator Sullivan, one of the chief architects of the bill, stated:

> "If you want advanced technologies to be deployed throughout this state, this is the bill to get us there, because it won't happen - its mandated in this bill. If you - if this bill doesn't pass, it won't happen." Senate Debate May 30, 2001, page 55.
>
> "A No vote could be interpreted as you would like the entire state of Illinois to fall into the digital divide wasteland. This - advanced telecommunications will not be deployed in Illinois unless in - as this bill states, it has to be. We need Illinois to be on the cutting edge. This bill requires that. .. The bill will put Illinois on a leading edge of forward-looking telecommunications policy in the nation for consumers and competition. I ask for an AYE vote." Senate Debate May 30, 2001, page 59.

Senator Mahar echoed Senator Sullivan's comments:

> "And as we approach this century and the 'age of information', who does not want us and all our constituents, from Cairo to Waukegan, from the inner city to rural Illinois, not to have access to high-speed internet? That's in this bill. ... It's very fair to the carriers, and a good bill for Illinois, and I urge an Aye vote." Senate Debate May 30, 2001, page 58.

Consistent with these comments, section 13-517(a) provides that ILECs "shall offer or provide advanced telecommunications services to not less than 80% of its customers by January 1, 2005." Section 13-517(b) made very specific provision for a waiver of this requirement. See 220 ILCS 5/13-517(b). Yet, despite the clear directive in section 13-517(a), and the legislative history confirming the legislature's intent, Verizon's Initial Brief betrays a refusal to accept its legal obligation to provide advanced services and presents unreliable and "unrealistic" data and analysis to support its waiver petition to avoid that obligation.

Throughout its Initial Brief, Verizon asserts that it alone should determine when, where, and to what extent it will deploy advanced services in Illinois. For example, on page 6, after commenting on the People's testimony in the case, Verizon asserts:

> " Moreover, the fact that the AG and Staff are even attempting to dictate to Verizon what services can be profitable is economically improper and poor public policy. The only prudent and legal course for the Commission is to let the marketplace and new technologies drive appropriate investment decisions."

At page 54, Verizon emphasized this concept, stating: "Again, the premise that the AG and Staff can better determine what services are profitable to deploy simply is ludicrous on its face." In describing its bona fide request or "BFR" process, whereby customers pay Verizon a portion of the costs to deploy DSL in a given area, Mt. Zion Ex. 1 at 3; Tr. 471, 474, Verizon stated:

> "This process allows Verizon and the interest group to engage in analyses, which could lead to rational DSL-TS deployment in high-cost market areas. In short, this process will accommodate what the market actually desires, not what various groups believe the public wants, and will ensure there is no undue economic burden on Verizon and its customers."

Verizon Initial Brief at 9. Verizon witness Slagle also made this point, when he said on cross-

examination:

> A. I think we're seeking a waiver for us to make a choice on what COs we want to deploy.
>
> Q. So you -- and if I'm mischaracterizing, correct me, but if I understood your answer, you're seeking a full waiver, and then Verizon would decide after getting a waiver where it would deploy.
>
> A. That would be a better way to put it, yes.

Tr. 122.

Verizon's express goal in this docket appears to be to retain the unfettered discretion to deploy advanced services as it chooses, irrespective of the legislative determination that such services should be broadly available to promote the public interest. See 220 ILCS 5/13-517(b)(2). This goal, to avoid the obligations imposed by section 13-517, may have led Verizon to place "litigation expediency" over a fair presentation of data. As Verizon itself admitted,

> "Verizon's filing did not attempt to answer the question: in which remaining exchanges might it be financially rational to deploy DSL transport services? This was not an issue for Verizon, since the Company will deploy DSL transport services to all financially rational areas. But to evaluate such a question requires an analyst to be grounded in reality. The high-level assumptions that I employed to address Verizon's total waiver request were not based on realistic assumptions in order to make a point. They were based on litigation expediency – since the assumptions were so aggressive, I assumed no interveners would question them (which is actually what occurred).

Ver. Ex. 8.0 at 9 (emphasis added). Had Verizon accepted the General Assembly's determination that deployment of advanced services is required and is in the public interest, it would have tailored its filings more closely to the legal requirements of section 13-517, and avoided the information quagmire it created by trying to nullify its section 13-517 obligations through "unrealistic" assumptions. See Ver. Ex. 8.0 at 3 (data "not reflective of reality"), 4, 6 (assumptions must be "realistic"), 5 (cost data "entirely inappropriate for determining realistic

exchange-specific investment levels"), 8-9 (litigation expediency led Verizon to present data to prove that compliance with section 13-517 an undue economic burden that was not based on realistic assumptions). A fair determination of whether Verizon is entitled to a waiver requires both fair and honest data and the commitment to follow the mandate of section 13-517 to make advanced services available to at least 80% of Verizon's customers to the extent economically possible. Verizon's Initial Brief demonstrates that neither of these factors were present in Verizon's case, and that a decision in its favor would be erroneous.

B. Verizon's Request That the Commission Decline to Enforce Section 13-517 Because DSL is a Federal Service Is Inconsistent with Verizon's Testimony and Should Be Rejected by the Commission.

In its Initial Brief, Verizon argued that the Commission cannot consider deployment of DSL in determining whether Verizon complies with section 13-517 because DSL is beyond the Commission's jurisdiction and because Verizon does not offer DSL directly to the public. Verizon Initial Brief at 15, 35. The People agree with Staff that the jurisdictional argument is improperly addressed to the Commission. The Commission lacks authority to either ignore the Public Utilities Act or declare it null or void. County of Knox ex rel. Masterson v. Highlands, L.L.C.,, 302 Ill.App.3d 342, 705 N.E. 2d 128 (3d Dist. 1998); Staff Initial Brief at 40-42.

Further, Verizon has attempted to set up a strawman by basing its waiver application on its inability to deploy DSL and then claiming that the Commission has no authority to address DSL deployment. Verizon Initial Brief at 15. Section 13-517 directs the ubiquitous provision of "advanced services." It does not specify what type of service or technology should be used. Verizon's decision to present DSL deployment as the mass market product best suited to

economically and ubiquitously provide high speed service supports the notion that DSL can reach a large portion of Verizon's customers at a relatively reasonable price. Ver Ex. 2.0 at 6-7, 9. It is disingenuous to argue that Verizon is entitled to a waiver because of the high cost of DSL deployment, but then argue that the Commission lacks the authority to review DSL deployment in the context of a section 13-517 waiver.

Curiously, Verizon claims that its DSL TS "is not directed to the public" and that "the fact that Verizon must offer or provide DSL TS to the 80% of its end-user customers is not even possible." [sic] Verizon Initial Brief at 15-16. If Verizon, as an ILEC or as a larger corporation with ISP affiliates, did not believe that DSL TS was capable of complying with section 13-517, why did Verizon use the cost and revenue profile of DSL TS to justify its waiver request in the first instance? It is apparent that Verizon's confusion between "realistic" and "expedient" data has spilled over into its legal arguments. Despite the fact that DSL has been offered by Verizon affiliates and other ISPs in some of Verizon's territory; that consumers have purchased that service; and that DSL provides services at speeds in excess of 200 kps, Verizon argues in its Initial Brief that its DSL TS service is somehow irrelevant to its obligation to offer or provide advanced services to its customers. This argument should be rejected as lacking credibility and conflicting with Verizon's own testimony, exhibits and data.

Verizon's arguments present a classic Catch-22 for Illinois consumers. Verizon maintains that the Commission only has jurisdiction over services such as DS-1, Frame Relay, ATM and HCD which are priced too high for the average residential and small business consumer and which are not in fact used by those consumers. See Verizon Initial Brief at 10-11 and Staff Ex. 1.0, Attachment 1.0 for a description of these services; People's Initial Brief at 4-5 for the

monthly and non-recurring charges for these services. Second, Verizon argues that although DSL service can economically serve residential and small business consumers and has been offered ubiquitously in various areas throughout the state and the country, the Commission lacks jurisdiction to consider it as an appropriate advanced service under Section 13-517. This would effectively put DSL beyond the reach of most of Verizon's Illinois consumers. Such a reading of Section 13-517 leads to absurd results, and should be rejected. See Staff Initial Brief at 22 and cases cited therein (section III.B.2.).

Finally, Verizon's argument that the Commission lacks jurisdiction to determine whether the cost of offering DSL in Verizon's service area can be considered in a section 13-517 waiver request because it may indirectly affect the price of DSL, which is set by federal tariff, must be rejected as specious. The states and the federal government share jurisdiction over various aspects of DSL. As Staff pointed out at pages 41-43, the Telecommunications Act of 1996 expressly shares jurisdiction over telecommunications services, provided state regulation does not prevent the provision of service. See 42 U.S.C. 253(a). Federal law does not prevent the Commission from considering how DSL and associated costs affect the ILEC's obligation under section 13-517 to provide advanced services to 80% of its customers.

II. Despite Verizon's Arguments to the Contrary, the General Policy Statements of Section 13-103 Do Not Preempt or Modify the Specific Requirements of Section 13-517.

Verizon claims that Section 13-517 has to be read to somehow incorporate a "prudence" standard it believes is found in Section 13-103 of the Public Utilities Act. 220 ILCS 5/13-103. Verizon Initial Brief at 18. It asserts that "prudence" language contained in 13-103(f) operates as an additional waiver criterion to be "read together" with the criteria listed in 13-517(b). Id.

Verizon's argument rests on the faulty premise that section 13-103 contains substantive requirements that somehow supplement or even supersede the express terms of section 13-517. It is well established that prefatory or policy pronouncements in a statute do not impose substantive obligations. In Illinois Independent Telephone Ass'n v. Illinois Commerce Commission, 183 Ill.App.3d 220, 236-237, 539 N.E.2d 717 (4th Dist. 1988), the Court said:

> "Prefatory language such as that contained in sections 13-102 and 13-103 of the [Universal Service] Protection Law generally is not regarded as being an operative part of statutory enactments. The function of the preamble of a statute is to supply reasons and explanations for the legislative enactments. The preamble does not confer powers or determine rights. (1A N. Singer, Sutherland on Statutory Construction § 20.03, at 81 (Sands 4th ed. 1985).) A declaration of policy contained in a statute is, like a preamble, not a part of the substantive portions of the act. Such provisions are available for clarification of ambiguous substantive portions of the act, but may not be used to create ambiguity in other substantive provisions. See Brown v. Kirk (1976), 64 Ill.2d 144, 355 N.E.2d 12."

Similarly, in GOCS v. Illinois Commerce Commission, 220 Ill.App.3d 68, 74, 580 N.E.2d 920, 923 (3d Dist. 1991), the court said:

> " We do not find the prefatory language of section 1-102 of the Act to mandate the consideration of the "long-term" cost of providing electrical utility service. (Ill. Rev. Stat.1989, ch. 111 2/3 , par. 1-102.) This section is identified simply as "Findings and Intent". The section states the general reasons for enactment of the legislation and lists major goals and objectives of public utility regulation. The section neither mandates the adoption of a particular type of cost study nor requires a certain time period over which such costs are to be developed. Furthermore, 'long-term cost' is not defined in the Act, and the Commission is given no direction as to how it is to consider 'long-term costs'".

Verizon's premise that the policy language in section 13-103(f) somehow modifies or undermines the standards contained in section 13-517 is simply wrong. Section 13-103 is relevant to section 13-517 in that it states the "policy of the State of Illinois" that "telecommunications services should be available to all Illinois citizens at just, reasonable, and affordable rates and that such services should be provided as widely and economically as possible in sufficient variety, quality, quantity and reliability to satisfy the public interest." 220 ILCS 5/13-103(a). Section

13-517's requirement that advanced services be deployed except when certain conditions are demonstrated is wholly consistent with this policy. Section 13-103 does not create, and cannot be used to inject, ambiguity into section 13-517 requirements.

Verizon's Initial Brief claims that Section 13-301(f) of the PUA sets out "[T]he General Assembly's stated policy that investment in advanced telecommunications services must be prudent." Verizon Initial Brief at 27-28. Accepting that a prudence standard is applicable to all telecommunications investment does not change Verizon's burden of proof or the Commission's standard of review under section 13-517. Section 13-103(f) does not define prudence, and Verizon has not offered any definition. Yet, Section 13-517(b) does define when an investment in advanced services will not be required and a waiver will be allowed. If the standards for a waiver are met, it is reasonable to conclude that the investment will not be required and may be viewed as not prudent. There is nothing in Verizon's reference to section 13-103(f) that undermines the People's or Staff's application of Section 13-517(b) to Verizon's Petition.

III. Verizon's Initial Brief Misstates the Evidence, Ignores Substantive Criticisms Made by Staff and the People, and Ignores Revisions Made By Verizon Itself.

Verizon's assertions in its Initial Brief about the evidence presented in this docket are characterized by its refusal to recognize or acknowledge the validity or significance of any evidence offered by other parties, and indeed, the relevance of changes Verizon itself made to its direct case in response to the testimony of other witnesses, most particularly Staff witnesses.

A. Verizon's Claim That Low Population Density Is a Major Factor in Increasing Costs Was Effectively Rebutted by Staff Witness Hanson.

Verizon asserts that the number of lines in and density of a serving area play a major role in the average cost to serve an area, and that "no party disputes that the number of lines in a

serving area as well as the density of that serving area play a major role in the resulting average cost to serve that area." Verizon Initial Brief at 41-42, 21. Although Verizon made that assertion in Mr. Trimble's direct testimony (Ver. Ex. 2.0 at 12), Staff witness Hanson responded with a sensitivity analysis that rebutted that assertion, based on the sample of exchanges used by Verizon in its Direct Testimony. Staff Ex. 2.0 at 13 & Attachment 3.0. He showed that these factors affect only *** *** of the variation in outside plant investment. Clearly, Mr. Hanson "disputes" that density plays a major role in the costs to serve rural areas. In response to Mr. Hanson's critique, Mr. Trimble offered a new analysis in his Rebuttal Testimony. Ver. Ex. 4.0 at 23 & DBT-1R. Yet, Verizon's Initial Brief at 22 presents the discredited cost figures from Mr. Trimble's direct testimony.

In addition, nowhere in its testimony or exhibits did Verizon identify the "low density" exchanges or provide cost data other than averages to justify its claim that low density areas are too expensive to serve. However, Staff's Late Filed Exhibits provide that information. A review of Staff late Filed Exhibit 4 shows that *** ** exchanges that have fewer than 1000 customers would generate revenues above costs at full deployment, based on Verizon's cost and revenue assumptions. Using the 45% cost to revenue ratio in Staff Late Filed Exhibit 2, *** *** exchanges that have fewer than 1000 customers could be served without imposing an undue economic burden on Verizon. This is out of approximately 256 exchanges that Verizon has identified as low population density.[1] A listing of those exchanges is in Attachment A to this Reply Brief.

[1] In Ver. Ex. 2.0, at page 10 Mr. Trimble testified that 62% of Verizon's 413 exchanges qualified as "low population density." This equals 256 exchanges.

Verizon also argues that its service area is not comparable to Ameritech Illinois's service area to support the notion that its costs to deploy DSL would be higher than Ameritech's. Verizon Initial Brief at 20-21. However, Verizon did not include any data about Ameritech's level of DSL deployment, or the costs associated with it. All the Ameritech-Verizon comparison shows is that their service areas have different average density characteristics. A more appropriate comparison might have been with other non-urban ILECs, like Gallatin River Telephone Co., or Citizens Telecommunications of Illinois. However, any relevant comparison would have to include DSL deployment levels and prices.

In short, Verizon's statements concerning the effect of low population density exchanges on costs were seriously contradicted by the evidence in this docket, and should not be taken at face value.

B. Verizon's Revision of its Penetration Rate in its Initial Brief Is Self-serving and Unreliable.

Although Verizon used a 17% penetration rate in its revenue projections in its direct, rebuttal and surrebuttal testimony, in its Initial Brief Verizon claims that this rate is too high. Regardless of whether 17%, 25% or 7% turns out to be the appropriate penetration rate, the fact remains that the People and Staff responded to Verizon's testimony that purported to show that at a 17% take rate, further DSL deployment was uneconomical. It was not the People's or the Staff's responsibility to ferret out a take rate different from the one Verizon chose. The question is: did Verizon fairly and reliably show that it could not offer advanced services to 80% of its customers? The People and Staff demonstrated that Verizon's presentation did not in fact prove what it set out to prove.

Verizon, in seeking to revise its evidence, argued in its Supplemental Surrebuttal

Testimony and later in its Initial Brief, that the 17% take rate it used throughout its testimony and exhibits was "unrealistic." Verizon Initial Brief at, e.g., 3, 4, 6, 8, 16, 23-26; Ver. Ex. 8.0 at 7-8. However, at the same time, Verizon states that Mr. Trimble's Table 7, which showed an overall 18% take rate for business and residential high speed access, "remains unscathed and stands as originally developed." Verizon Initial Brief at 53. That table was based on the Southern Illinois University study, which concluded that 18% of business and residential customers would be willing to subscribe to high speed internet access at a price of $50.00 per month. Ver. Ex. 2.0 at 20. Mr. Trimble further pointed out that this 18% actually translated into a *** *** penetration rate of customers with computers. Id. at 19. This would imply that as more customers obtain computers, the overall penetration rate would increase. Verizon's own witness amply supported the use of a 17% take rate.

Verizon also suggests the penetration rate is unrealistic when used by the People or Staff because there are alternatives to DSL that would reduce Verizon's market share should it deploy DSL. E.g., Verizon Initial Brief at 29, 55; Ver. Ex. 2.0 at 20. However, Verizon never offered any evidence on the extent of available alternatives in the waiver area or in its service territory as a whole. Although Verizon chided Staff for not conducting such an analysis, see Verizon Initial Brief at 55 and Tr. 361- 362, 367- 368, 371-372, Verizon did not produce anything other than the most general statements, usually in the form of questions from counsel, about high speed internet alternatives other than the fact that the residents in the Village of Mount Zion have access to cable-modem service. Verizon Initial Brief at 56. Given the fact that Verizon had the burden of proof to demonstrate that a waiver of the section 13-517 requirements was "necessary", and its position that the existence of alternatives would support its request for a waiver, the lack of

evidence on alternatives to DSL works against Verizon. Clearly, it is not the People's responsibility to provide data to support Verizon's waiver claim where Verizon has failed to do so.

Where a party fails to produce evidence in his control, the presumption arises that the evidence would be adverse to that party. Saunders v. Illinois Dept. of Public Aid, 198 Ill.App.3d 1076, 556 N.E.2d 736 (1st Dist.1990), citing Kane v. Northwest Special Recreation Assoc. (1987), 155 Ill.App.3d 624, 108 Ill.Dec. 96, 508 N.E.2d 257.) In Saunders, the judge justifiably considered that failure to produce in determining that the defendants had sufficiently established a mailing date. Similarly, in Fuery v. Rego Co., 71 Ill.App.3d 739, 390 N.E.2d 97 (1st Dist. 1979) , the Court said that if evidence with respect to an issue is within control of adverse party, it is he who has burden of proof on that issue. An unfavorable evidentiary presumption arises if party, without reasonable excuse, fails to produce evidence which is under his control. See also Dollison v. Chicago, R. I. & P. R. Co., 42 Ill. App.3d 267, 355 N.E.2d 588 (1st Dist. 1976). Verizon has the burden of proof in this docket. Although it did not provide a list or clear description of the proposed waiver area (see People's Initial Brief at 9-12), presumably it knows what areas the waiver would apply to and whether there are alternatives to DSL in those areas. The absence of this information cannot be taken as a failing of a party other than Verizon.

C. Verizon's Repeated Assertion That DSL Deployment Would Result in Improper Subsidies Is Based on a Misapplication of Commission Rule 791, Ignores the Record, and Is Premised on a Misuse of "Averaging."

Verizon asserts at pages 30 through 33 of its Initial Brief that DSL should not be deployed to reach the 80% statutory threshold because it would require "substantial subsidies." It cites Commission Rule 791 as an example of a "clear and unambiguous definition as to whether a

service is subsidized." See 83 Ill. Admin. Code Part 791; see also Ver. Ex. 4.0 at 19. This rule states that a service is subsidized "if the total revenue resulting from the service equals the long-run service incremental cost of providing that service." 83 Ill. Admin. Code 791.90.

Commission rule 791.90 identifies two components to be compared in order to determine if a service is subsidized; the total revenue resulting from the service, and the long-run service incremental cost of providing the service. 83 Ill. Admin. Code 791.90. Although Verizon fairly asserts that incremental costs should be considered, it incorrectly maintains that only incremental – not total – revenues be considered. The rule does not support the proposition for which Verizon asserts it. See Verizon Initial Brief at 29. The record demonstrates that what Verizon means by the incremental approach is that incremental costs must be matched with incremental revenues, and that total revenues from advanced services cannot be considered. Verizon Ex. 7.0 at 4. Total revenues from DSL service are not part of the record, so it is impossible to apply the Part 791.90 test to determine whether continued deployment of DSL would in fact violate the Commission's subsidy rules. Because this data is solely within the control of Verizon, its failure to provide it, regardless of whether it was requested by any other party, raises the presumption that the evidence would be adverse to Verizon. Saunders v. Illinois Dept. of Public Aid, 198 Ill.App.3d 1076, 556 N.E.2d 736 (1st Dist.1990)(and cases cited above).

Verizon did not argue that the central office deployment proposal of People's witness William Dunkel raised subsidy issues. See Verizon Initial Brief at 47-55. Further, Mr. Dunkel's proprietary schedule WD-1 demonstrates that the revenues from central office DSL deployment far exceed the associated costs at full deployment, eliminating any subsidy objection. Mr. Dunkel's analysis, which considers incremental costs and incremental revenues only,

demonstrates that the People's recommendation that service be deployed to the 69.9% of customers who can be served from their central office does not raise subsidy issues. In addition, by considering revenues over the life of the investment, Mr. Dunkel showed that revenues from central office DSL deployment more than covered costs in the long term. See AG-Trimble Cross Ex. 1P.

As discussed in the People's Initial Brief at pages 16-17, Verizon can only argue that "subsidies" exist by improperly averaging costs so that the exceptionally high costs to serve a relatively few exchanges and customers (the 10.1% who would need outside plant investment to get service) raise the costs for the remaining customers sufficiently so that the expected revenues do not exceed total incremental costs. Staff's approach, which looked at the costs and revenues associated with each exchange, both revealed specifically where costs exceed expected revenues, and eliminated the exceptionally costly exchanges from the deployment area. By limiting deployment to those exchanges where the costs were more closely related to expected revenues, Staff could propose deployment that in the aggregate covered Verizon's costs and required no "subsidy." See Staff Late Filed Exhibits 2, 4 and 6. Accordingly, the waiver area Staff identified could be considered the areas where a subsidy would be necessary.

IV. Verizon's Claim that People's Witness William Dunkel Misused Verizon Data is Self-serving and Specious.

Verizon attacks People's witness William Dunkel's testimony[2] by claiming that Mr.

[2] In their Initial Brief, the People presented only Mr. Dunkel's conclusion that Verizon should not receive a waiver for the 69.9% of its customers that can be served from the central office. Mr. Dunkel's conclusion that Verizon could economically serve 80% of Verizon's Illinois customers was not asserted due to the problem caused by Verizon's failure to provide cost data for current deployment. The 80% deployment scenario depended on revenues from

Dunkel "misused" Verizon's data and assumptions to reach a conclusion that Verizon did not intend. Verizon's arguments are not substantive, and if anything, highlight the deficiencies in Verizon's own case.

Although Verizon does not contest or challenge Mr. Dunkel's cost figures, it claims that Mr. Dunkel used an incorrect penetration rate to calculate revenues. Verizon Initial Brief at 48. Mr. Dunkel used the same penetration rate that Verizon used in its Direct and Rebuttal Testimony and Exhibits. Ver. Ex. 2.0 at 18-20; Ver. Ex. 4.0 at 24-27 & DBT-1R . Further, Verizon admitted that Table 7 in Verizon Exhibit 2 which explained the penetration rate was "unscathed." As discussed above at page 11, Verizon's attack on its own assumptions concerning penetration rates is not credible, and if anything calls Verizon's entire case into question.

Even if Verizon wants to retract its selection of a 17% penetration rate, its assertion that a *** *** penetration rate is more appropriate was first made in Verizon's Surrebuttal Testimony. Ver. Ex. 7.0 at 22. Further, no Verizon witness presented a revision of Mr. Dunkel's testimony or analysis using lower penetration rates, and Mr. Trimble did not calculate how a lower penetration rate would affect Verizon's or Mr. Dunkel's net present value analysis. Tr. 601; Ver. Ex. 7.0 at 22-24 (no calculations offered); Ver. Ex. 8.0 (same).

The *** *** take rate that Verizon now claims should have been used is not representative of large scale deployment and is not supported by sufficient detail to be reliable. Mr. Trimble did not say when the data in Table 5SR (where that percentage first surfaced) was

---

current deployment as well as future deployment, but did not include costs for current deployment. Because of this mis-match, the People declined to present the 80% deployment alternative in brief. As a result, the People will not respond to the comments on Mr. Dunkel's 80% analysis contained in Verizon's Initial Brief at pages 50-54.

compiled or the number of lines it covered. Assuming that the table was complied in January, 2003 when Mr. Trimble's Surrebuttal Testimony was filed, Verizon considered DSL qualified lines in only 10 exchanges (assuming exchanges qualified in 1999 were considered in-service for at least three years in January, 2003). Tr. 626. In 2000, it added another 11 exchanges, but those exchanges could not be considered in service for three years as of January, 2003. See Tr. 626. The total number of qualified lines associated with the 10 exchanges served by year-end 1999 was only about 104,000 lines. Tr. 628-629 (another 52,000 were added in 2000, id.). The penetration rate for this small number of exchanges should not be considered representative of the expected take rate when deployment becomes more widespread, especially without further explanation or analysis of whether this small group is a fair sample. See Staff Ex. 2.0 at 8-11 (problems with small samples discussed). The Southern Illinois University study that Verizon presented in Mr. Trimble's Direct Testimony represents a better, and an independent, analysis of currently anticipated broadband penetration. See Ver. Ex. 2.0 at 19-20, including Table 7.

Verizon also criticizes Mr. Dunkel's analysis because he failed to consider other competing technologies. Verizon Initial Brief at 48. Yet, as pointed out above at pages 11-12, Verizon provided no substantive information about alternative technologies in its direct or rebuttal testimony. If Verizon did not believe that evidence about alternative technologies was relevant to support its waiver petition, there is no reason for other parties to provide such information. Verizon's claim that Mr. Dunkel's analysis has "no basis in reality" because he did not consider alternative technologies is either specious, or applies with equal force to the evidence on which Verizon's petition is based.

The little information about alternative technologies in the record came from the

testimonies of Gary Lambert, a consumer intervener, and Paul Ruff on behalf of the Village of Mt. Zion. Mr. Lambert testified that his dial-up service was unreliable, Tr. 36-37, and that there was no high speed option available. Tr. 46 (no satellite internet service). Mr. Ruff testified that although the local cable company offered high-speed internet access,

> [F]or the citizens of Mt. Zion one of the big concerns is having some kind of choice. At this point in time we do have Insight Communications that has high speed Internet service, but in the whole scheme of things and from an economic and community development standpoint, we definitely would like to see another player at least be somewhat competitive in price because I think the quality is – at least from the people that I've talked to, the quality is really the key.

Tr. 61.

These witnesses address two major considerations that stem from Verizon's comments that the existence of alternative providers somehow supports Verizon request for a waiver. First, the evidence of alternatives is flimsy at best. Second, only one of the two witnesses who discussed alternatives had an alternative to dial-up service, and that witness expressed a clear preference for a competitive choice. Tr. 61 supra. This is consistent with the purpose behind House Bill 2900 (see page 1 above), Illinois law, 220 ILCS 5/13-103(b) and (f), and the Telecommunications Act of 1996, 47 U.S.C. 251 et seq. These laws are based on the premise that competition in telecommunications services is in the public interest and should be encouraged. If the existence of alternatives to Verizon high speed service were sufficient to excuse compliance with section 13-517, these pro-competition policies would be frustrated.

Verizon refers to the Commission's 2002 Annual Report on Telecommunications Markets in Illinois to suggest that Verizon has no market power in connection with high speed internet access. Verizon Initial Brief at 38. However, the Commission's report is based on state- wide data. Annual Report at 28, Tables 14 and 15. No inference can be drawn about the existence of

competitive alternatives in Verizon's service area. Further, the Annual Report concluded that "when measured relative to the distribution of local exchange lines and population, high-speed provisioning in Illinois appears to lag the nationwide average." Annual Report at 29. This "lag" should not be exacerbated by relieving Verizon of its obligation to provide high speed services when the evidence does not show that such a waiver is necessary or in the public interest.

V. Conclusion

For the foregoing reasons, and the reasons stated in their Initial Brief, the People of the State of Illinois request that Verizon's request for a certification of compliance with section 13-517(a) be denied, and that its request for a waiver under section 13-517(b) be denied for failure to meet their burden of proof, or in the alternative that it be denied for the 69.9% of Verizon's customers that can receive DSL service from central office deployment.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General of Illinois

By: _____

JANICE A. DALE
SUSAN L. SATTER
RANDOLPH R. CLARKE
Assistant Attorneys General
Public Utilities Bureau
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
Telephone: (312) 814-3736
Fax (312) 814-3212
jdale@atg.state.il.us
ssatter@atg.state.il.us
rclarke@atg.state.il.us

April 4, 2003